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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-488

STATE OF TENNESSEE, ex rel.,
JAMES W. HARTLEY, et al.,
Petitioners

vs.

THE CITY OF CHATTANOOGA,
TENNESSEE, et al.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

EUGENE N. COLLINS
City Attorney

RANDALL L. NELSON
Special Counsel
400 Pioneer Building
Chattanooga, Tennessee 37402

COURT INDEX PRESS, INC. — 809 Walnut Street, Cincinnati, Ohio 45202 — (513) 241-1450

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Respondents respectfully submit that no Writ of Certiorari should issue to review the judgment of the Supreme Court of the State of Tennessee, which Court affirmed the judgment and opinion of the trial court, the Circuit Court of Hamilton County, Tennessee.

OPINION BELOW

The opinion of the Supreme Court of Tennessee is unreported as is the decision of the Circuit Court of Hamilton County, but they are set forth adequately in the Petition for Certiorari.

THE JURISDICTIONAL STATEMENT IS DEFICIENT

Respondents would show that both the Jurisdictional Statement and the Statement of the Case in the Petition are deficient, and not in compliance with Rule 23 (f) of this Court. Specifically, neither the Jurisdictional Statement, found on Pages 2 through 4 of the Petition, nor the Statement of the Case, found on Pages 6 and 7 of the Petition, "specify the stage and the proceedings in the court of first instance and the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them . . .; and the way in which they were passed upon by the Court; . . ."

In fact, the original Petition, properly filed in the court of first instance, made only two Federal Constitutional allegations, they being:

"VI.

That Code Section T.C.A. 6-309 is unconstitutional, in that it violates the Fourteenth Amendment of the United States Constitution, and the Constitution of the State of Tennessee, Article I, Section 8.

VII.

The above enumerated ordinances violate the Fifth Amendment to the United States Constitution."

The latter allegation as to the ordinances violating the Fifth Amendment of the United States Constitution was thereafter reiterated in Paragraph 12 of the original Complaint, a copy of which is appended hereto. (Appendix A).

The Motion for Summary Judgment mentioned in the Petition did not raise any Federal Constitutional issues (*see*, Appendix B).

Neither of the allegations set forth above, nor any other constitutional allegations, were assigned as error or in any other way called to the attention of the Appellate Court, the Supreme Court of Tennessee, when petitioners herein filed their Assignment of Errors, Brief and Argument on behalf of appellants in the Tennessee Supreme Court as can be ascertained from their pleadings, also appended hereto. (Appendix C)

However, this case was consolidated with another case for opinion purposes in the Supreme Court of Tennessee and the other case raised constitutional issues which the petitioners herein did not, which can be seen from their Assignment of Errors, etc., appended hereto.

At no point in either of the Courts below did petitioners herein raise the arguments found on Pages 7 and 9 of their Brief that the Legislature of the State of Tennessee, in enacting a statute during the pendency of this action, gave rights to other citizens that were not given to these petitioners. Further, petitioners herein failed to file a Petition to Rehear in the Supreme Court of Tennessee which petition could have raised this point.

The petition thus fails to show that "the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari." Rule 23 (f).

Respondents would further show that as to the second question presented for review on Page 5 of the Petition, the jurisdiction of this Court is not properly invoked, because that question does not draw into question the validity of a state statute on the ground of its being repugnant to the Constitution, treaties or laws of the United States, nor set up or claim any title, right, privilege or immunity under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States as required by 28 U.S.C.A. 1257 (3).

THE WRIT SHOULD BE DENIED BECAUSE THE STATE COURT DECIDED THE ISSUES IN ACCORDANCE WITH APPLICABLE DECISIONS OF THIS COURT, OTHER FEDERAL COURTS, AND THE LAW OF THE LAND.

The leading case on constitutional law under the Federal Constitution as it pertains to annexation by municipalities is *Hunter* v. *City of Pittsburgh*, 207 U.S. 161, 28 S.Ct. 40, 52 L.Ed. 151. That case involved a challenge to a state's annexation statutes which allowed consolidation of a city into a larger municipality over the disapproval of a majority of its residents. Therein, in overruling an attack on the Pennsylvania annexation statute based on the Due Process Clause of the Fifth Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment, this Court held:

> "Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be entrusted to them. . . . The number, nature and duration of the powers conferred upon these corporations and *the territory over which they shall be exercised rests in the absolute discretion of the state.* Neither their charters, nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the state within the meaning of the federal constitution. The state, therefore, at its pleasure may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, *expand or contract the territorial area*, unite the whole or a part of it with another municipality, repeal the charter and

> destroy the corporation. *All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protests. In all these respects the state is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. . . .*" (Emphasis Supplied).

The constitutionality of the very statutes here under attack has frequently and recently been upheld in both the federal and state courts.

In *Deane Hill Country Club, Inc.* v. *City of Knoxville,* 379 F.2d 321 (6th Cir.), cert. denied 389 U.S. 975, 88 S.Ct. 476, 19 L.Ed.2d 467, a case sustaining the constitutional validity of the very statutes here assailed, the Court held, after quoting from *Hunter*:

> "It is clear . . . that *Hunter* precludes constitutional challenge under the Fourteenth Amendment to annexations by municipal corporations of adjoining territory on the basis of the procedure employed or authorized by the state or because of the pecuniary repercussions in the form of the ordinary incidence of city taxation. It follows that the District Court properly dismissed the complaint herein."

Similarly, the Tennessee Supreme Court has, on many occasions, upheld these statutes from constitutional attack. *State, ex rel. Stall* v. *City of Knoxville,* 211 Tenn. 271, 364 S.W.2d 898, cert. denied 372 U.S. 914, 83 S.Ct. 728, 9 L.Ed.2d 721; *State, ex rel. Balsinger* v. *Town of Madisonville,* 222 Tenn. 272, 435 S.W.2d 803; *Witt* v. *McCanless,* 200 Tenn. 360, 292 S.W.2d 392; *State, ex rel. Morton* v. *Johnson City,* 206 Tenn. 411, 333 S.W.2d 924; *Knoxville* v. *State, ex rel. Graves,* 207 Tenn. 558, 341 S.W.2d 718.

Petitioners argue, despite *Hunter*, that annexation is a deprivation of property without due process of law. This issue has long been concluded by the Supreme Court of Tennessee which held, even prior to *Hunter*, in *Williams* v. *Nashville*, 89 Tenn. 487, 15 S.W. 364 (1891):

> "The extension of corporate limits so as to include additional territory is in no sense an impairment of the owner's liberty, nor is it a taking of private property for public use. If it were held to be so, then no municipal corporation could be established or enlarged, and none of these valuable instrumentalities of the State would have a lawful existence.
>
> * * *
>
> *Placing property within the corporate limits of a given town or city*, where it will be subjected to the additional burden of municipal taxation and supervision, *is not a taking of the property at all.* The ownership is in no degree changed, and the increased burden is presumed to be equaled by the increased advantages." (emphasis supplied).

This decision has recently been reaffirmed in *State, ex rel. Balsinger* v. *Town of Madisonville, supra.*

Hunter was recently applied as controlling law in several federal cases raising due process and equal protection challenges to annexations. In *Detroit Edison Co.* v. *East China Township School District*, 247 F.Supp. (E.D. Mich. 1965), aff'd 378 F.2d 225 (6th Cir., 1967), cert. denied 389 U.S. 932 (1967), property owners sued for a declaration that annexation of school districts to a district where their property was located was a violation of the federal constitution. Citing *Hunter, supra,* the District Court held:

> "Any alteration of municipal boundaries is a matter within the complete discretion of the state and not

confined by any rights secured by the federal constitution." 247 F.Supp. at 299.

The District Court also considered the effect on *Hunter* of *Gomillion* v. *Lightfoot*, 364 U.S. 339, 5 L.Ed.2d 110, 81 S.Ct., 125 (1960), and further held:

> "Gomillion does not diminish the authority of *Hunter* in annexation *procedure* cases." (Emphasis in the original.) 247 F.Supp. at 300.

On appeal, the United States Court of Appeals for the Sixth Circuit affirmed in an opinion which included the following relevant discussion:

> "Two other Circuits, the Fifth and Tenth, have had occasion to pass on cases where the constitutionality of a state annexation procedure was raised. As the District Court noted, both Courts of Appeals relied on *Hunter* v. *City of Pittsburgh* in affirming dismissals of their respective cases. In *Hammonds* v. *City of Corpus Christi*, 343 F.2d 162 (5th Cir.), cert. denied, 382 U.S. 837, 86 S.Ct. 85, 15 L.Ed.2d 80 (1965), the court found no error in the District Court's decision which dismissed the complaint on the ground, among others, that *'the annexation of lands to a city has been held without exception to be purely a political matter, entirely within the power of the State Legislature to regulate'*. And in *International Harvester Co.* v. *Kansas City*, 308 F.2d 35 (10th Cir., 1962), cert. denied, 371 U.S. 948, 83 S.Ct. 503, 9 L.Ed.2d 498 (1963) after quoting from *Hunter*, stated:
>
> > 'Neither the due process clause nor the concept of equal protection is available to persons seeking to obstruct the ordinary and necessary exercise of a state's political functions. * * *'"

378 F.2d at 229. (Emphasis Supplied).

In *Gomillion,* this Court further said:

> "[I]f one principle clearly emerges from the numerous decisions of this Court dealing with taxation it is that the Due Process Clause affords no immunity against mere inequalities in tax burdens, nor does it afford protection against their increase as an indirect consequence of a State's exercise of its political powers."

Petitioners herein, not unsurprisingly in view of the copious case law directly adverse to their position, have failed to cite any line of authority, or for that matter, even a single case which holds that state annexation laws such as Tennessee's violate either the Due Process or Equal Protection provisions of the Constitution. Annexation is a purely political matter within the power of the States to regulate.

Insofar as the Petition raises questions of compliance with the state annexation statutory procedures, these are purely matters of state law raising no federal issue as noted in *Hunter* v. *City of Pittsburgh, supra.* On this very point, the Tenth Circuit recently denied federal jurisdiction to review an annexation in which procedural errors were alleged, saying:

> "We have held that error in the administration of state law is not a matter of federal cognizance under the Fourteenth Amendment due process clause." (Citing, *International Harvester Co.* v. *Kansas City, supra*) *Wallace* v. *City of Altus, Oklahoma,* 465 F. 2d 420 (10th Cir., 1972)."

Petitioners' argument seems to be two-fold: (1) That the annexation ordinances in question, for one reason or another, violated provisions of the State Law and State Constitution; and (2) That they were denied equal protection of the laws because the Legislature of the State of Tennessee, while this case was pending on appeal, en-

acted prospective legislation changing the burden of proof, which legislation specifically excluded litigation then pending.

The first contention is fully disposed of by *Hunter, supra,* in which the Court said:

> "We have nothing to do with the interpretation of the Constitution of the State and the conformity of the enactment of the assembly to that Constitution; those questions are for the consideration of the courts of the state, and their decision of them is final."

With regard to the second contention, petitioners' argument, logically extended, would require all new laws to be declared unconstitutional because they affect persons in the future differently than they have been in the past. The Equal Protection Clause has never been construed to forbid statutes and amendments thereto from having a beginning, and thus to discriminate between the rights of an earlier and later time. *Williams* v. *Walsh,* 222 U.S. 415, 56 L.Ed. 253, 32 S.Ct. 137; *Sperry and Hutchinson Co.* v. *Rhodes,* 220 U.S. 502, 55 L.Ed. 561, 31 S.Ct. 490; *In Re Norwalk Call,* 62 Cal.2d 185, 41 Cal. Rptr. 666, 397 P.2d 426, appeal dismissed *Herald Publishing Co.* v. *Whitehead-Donovan Corporation,* 382 U.S. 13, 15 L.Ed.2d 8, 86 S.Ct. 41.

CONCLUSION

It is respectfully submitted that the Supreme Court of Tennessee has acted exactly in accordance with the long-established case law of both that Court and this Court and in accordance with the law as it has been almost uniformly interpreted across the country and that, therefore, the Petition for Certiorari should be denied.

EUGENE N. COLLINS
City Attorney

RANDALL L. NELSON
Special Counsel

Attorneys for Respondents
400 Pioneer Building
Chattanooga, Tennessee 37402
(615) 265-2291

APPENDIX A

IN THE CIRCUIT COURT OF
HAMILTON COUNTY, TENNESSEE

No. N-16202

STATE OF TENNESSEE, EX REL JAMES W. HARTLEY, LEONARD L. McCURDY, B. A. FALLS, H. L. HORNE, J. ELDON HART, GORDON H. MASSEY, Jr., ROBERT D. MASSENGALE, E. SHAYNE RICHIE, WALTER L. HILLIS, DONALD BROWN

vs.

CITY OF CHATTANOOGA, ROBERT KIRK WALKER, Mayor, et al. and DAVID M. PACK, ex rel., Attorney General of the State of Tennessee

---

PETITION

(Filed February 25, 1972)

Come now the relators named in the caption, individually and as a class, and would respectfully show unto the court:

I.

That the defendants have passed Ordinances numbers 6395 and 6396 and Resolution number 9167, by which the said defendants seek to annex to the City of Chattanooga, Tennessee, certain territory not now a part of the said City of Chattanooga.

Relators would show that the defendants have formulated a map on which ordinances numbers 6395 and 6396 are alleged to apply to an area they have designated as area 13 A on map B-B. True and exact copies of said ordinances are attached hereto as exhibits A, B, and C and are hereby adopted and made a part hereof as fully and completely as though specifically copied herein, but not for copy.

II.

Your relators would show that all the petitioners are householders and freeholders of all the respectively mentioned area or district named in the foregoing paragraph.

Petitioners over that they have the right under the General Law and particularly T.C.A. § 6-310 to institute this proceeding.

III.

Said Ordinances Nos. 6395 and 6396, which purport to annex Area 13 A to the present corporate limits of Chattanooga, state:

> "WHEREAS, after such public hearing and investigation by the Board of Commissioners and its representatives, it now appears that the prosperity of the territory herein described, and as described in said notice, and the municipality, will be materially retarded, and the safety and welfare of the inhabitants and property of this City and the herein described territory will be endangered if such area is not annexed; and
>
> "WHEREAS, the annexation of the herein described territory is deemed necessary for the health, welfare, and safety of the residents and property owners thereof, as well as of the City of Chattanooga, Tennessee, as a whole, there being substantial development located in said area."

Relators aver that any finding by the defendants that the municipality or Area 13 A would be materially retarded and the safety and welfare of its inhabitants and property would be endangered if such are not annexed, based upon the so-called public hearing conducted, at an unreasonable time, with speedy presentation and a less than courteous atmosphere, as cited in the said ordinance, is completely erroneous and constitutes an arbitrary and oppressive abuse of powers delegated to the City of Chattanooga, Tennessee, by the Tennessee Legislature.

From the material prepared by the defendants, and the so called public hearing conducted by the defendants, could only relate to what the defendants purport to call an investigation or study area prepared by Hansley-Schmidt, Inc., exclusively for the City of Chattanooga, and the burden of which must be born by the already greatly overburdened tax payers of the City of Chattanooga. It should be noted the defendants have not even followed the recommendations fully, set out by "their" engineering consultants, which amounts to fraud upon the citizens and property owners of the City of Chattanooga, whose wishes and desires in the matter have never really been considered, and annexation of area 13 A and is an abuse of its delegated legislative powers.

IV.

That the defendant, City of Chattanooga, did not comply with the law as to the notice required under T.C.A. 6-309.

V.

That the defendant, City of Chattanooga, did not comply with the law in respect to the public hearings required under T.C.A. 6-309.

That the above enumerated ordinances were not passed in compliance with the Charter of the City of Chattanooga, and particularly in accordance with Chapter I, Title II of said Charter.

VI.

That Code Section T.C.A. 6-309 is unconstitutional, in that it violates the Fourteenth Amendment of the United States Constitution, and the Constitution of the State of Tennessee, Article I, Section 8.

VII.

The above enumerated ordinances violate the Fifth Amendment to the United States Constitution.

VIII.

Relators would show that the prosperity of the City of Chattanooga, and Area 13 A will not be materially retarded and the safety and welfare of the inhabitants and property thereof endangered if such annexation does not take place, but to the contrary, evidently from statements made by the defendants, at the "so called public hearing", admit that the finances of the City of Chattanooga are already in jeopardy, in that they are unable to meet the standards of a city this size in other parts of the country, by the number of adequate personnel to administer the different departments, which are evidently understaffed and underpaid by standards of comparable cities, but the defendants, by their own admissions, must rely upon subsistence or hand outs from the State and Federal governments under different types of assistance programs to even hope to accomplish the promises of service to the area to be annexed, but giving no plausible explanation

as to what would happen to this area should these hand-out monies cease to exist, after the City has taken on the additional and gruesome burden of improving Area 13 A. The true facts are the City, again by the statements of the defendants to residents in the affected area, were that the improvements, necessary to comply with the legislative requirements would be only by this subsistences route, and under the proposed 1971 legislative act, would only add the services to the affected area as they could gain this money to pay as they go. There can be little doubt, since this was clearly stated by the defendants, that should the 1971 act be declared unconstitutional, they are going to "take this area into the City" without even the hope of making the residents pay only for what they get, "therefore, placing a double burden of taxation on the area, without any improvements until the City feels a reasonable time. This has been the attitude and action of the defendants regarding areas previously annexed prior to the 1971 Act, and many of these areas, although having become a part of the City, have not, nor do they see in the near foreseeable future, any benefits from the annexation. However, their taxes have doubled.

This is further born out by the fact the City has not given the type and kind of services they have indicated they would give this affected area, to the residents of long standing in the City of Chattanooga, and it would be reasonable to assume that they would take care of their own residents, before taking on more responsibility. There can be little doubt these ordinances enacted to force the residents of Area 13 A, are designed "only to help an already sagging City financial program."

This is further born out by the statements made by different defendants, of their additional needs to meet the bare requirements of the present city limits, such as enough

money to bring their departments up to standard, because of lack of personnel and equipment.

Statements made by members of the previous City Commission, some of whom are the defendants in the above styled case, show conclusively, the commission's inability to live up to the promises and expectations enunciated by the present defendants.

Area 13 A is, to a great degree, an agricultural area, made of residents who have had their homes there for many, many years. That the road, terrain, and other geographical terrain is such that the cost of the improvements promised in glowing terms by the defendants would be unsound, unfeasible and a complete waste of money and the benefits to the residents of this area would be nill. The only benefit to the defendants would be the collection of an unfair and burdensome tax. It is verily believed by said relators that the action of the defendants is not being taken in a conscientious and forthright manner, and therefore, by all the rules of democracy, fair play and honesty fail to meet the requirements or the intent of the legislature.

This was further shown by the fact the notice given by the defendants of a public hearing was defective and did not comply with Tennessee Code Section 6-308 6-309, in that it included a confusing and erroneous boundary description of certain areas to be annexed. That the defendants did not conduct the so called public hearing in accordance with the terms and intent of the Tennessee Legislature to have a public hearing for the purpose of ascertaining information helpful in determining whether or not the prosperity of a municipality and territory proposed to be annexed will be materially retarded and the safety and welfare of the inhabitants and property thereof endangered.

IX.

That Area 13 A includes many areas of land used purely for agricultural purposes and which had been for many, many years, which is neither necessary for building or for the population of Chattanooga Area 13 A, as some of the relators own such land, and it is not for sale nor are they interested in developing it.

X.

The actual reasons enumerated by the defendants, at the so called public hearing was for the purpose of gaining additional revenue, presumably to help finance the present City of Chattanooga, and any improvements to the affected area would be inconsequential, and is not a legitimate reason and prostitutes the very intent of the legislature in passing Tennessee Code Section 6-309, and therefore, does not support the findings by the defendants that Area 13 A will be materially retarded and the safety and welfare of its inhabitants and property endangered. It is the insistance of the relators that to be annexed under these conditions would work irreparable harm to the residents of Area 13 A.

XI.

That the proposed annexation is unreasonable because it creates an unjust, unfair and unreasonable financial burden on both the citizens living within the presently incorporated City of Chattanooga as well as the citizens in the areas to be annexed by the ordinances heretofore referred to.

XII.

That said ordinances violate the Fifth Amendment to the United States Constitution.

XIII.

That prior to the passage of the ordinances numbers 6395, and 6396, and resolution 9167 purporting to adopt a plan of service setting forth the identification and the projected timing of municipal services proposed to be extended by the City of Chattanooga into Area 13 A, proposed to be annexed to said City. That authority for the adoption of said plan of services is based on Chapter 420 of the Tennessee Public Acts of 1971, a copy of which is attached hereto as Exhibit D, and is hereby adopted and made a part hereof, as fully and completely as though specifically copied herein, but not for copy. That prior to the adoption of said Resolution 9167, a complaint was filed by the Honorable Chester Frost, County Judge of Hamilton County, and the County Council, seeking to have Chapter 420 of the 1971 Tennessee Public Acts declared unconstitutional and in violation of Article 2, Section 9 of the Constitution of the State of Tennessee. That said complaint for declaratory judgment is pending in the Chancery Court of Hamilton County, Tennessee and no final adjudication of the constitutionality of said public act has been made. Relators aver, therefore, that the hearing of this cause should be stayed until after a final adjudication by the Tennessee Supreme Court has been made regarding the constitutionality of Chapter 420 of the 1971 Tennessee Public Acts. Relators aver that to do otherwise would seriously jeopardize their right to fairly and equitably litigate the reasonableness or unreasonableness of the proposed annexation of Area 13 A. Further, that in the event said Chapter 420 is declared unconstitutional, the defendants have made no provision for an alternate reasonable plan of services for said Area 13 A. Relators further aver that the defendants have acted arbitrarily and abused their delegated legislative powers by

passing ordinances unreasonable on their face, purporting to annex Area 13 A by a method which its constitutionality has to yet be determined.

XIV.

Relators would further show that Chapter 420 of the Public Acts of Tennessee for 1971 is restricted in its application to Hamilton County, and no other county or state.

PREMISES CONSIDERED, RELATORS PRAY:

1. That proper process issue and be served on the defendants, requiring them to answer this complaint, but their oaths to their answers is waived.

2. That this Honorable Court declare that Ordinances 6395 and 6396 and Resolution 9167 were illegally enacted by the defendants, and are unreasonable and invalid, and that the Court enter a decree vacating same.

3. That the Court stay the hearing on this matter until after a final adjudication by the Tennessee Supreme Court adjudging the constitutionality or unconstitutionality of Chapter 420 of the 1971 Tennessee Public Acts.

4. That the Court render a judgment on the constitutional questions raised in this petition.

5. Relators pray and/or demand a jury to try the issues in this cause.

6. That they be granted such other, further and general relief as the equities of the cause may demand.

BROWN & BROWN

By: .....

Attorneys for Relators
916 James Building
Chattanooga, Tennessee 37402

(JURAT OMITTED)

APPENDIX B

NO. N-16198

STATE OF TENNESSEE, ex rel OTIS O'DELL, et al.

vs.

CITY OF CHATTANOOGA, et al.

NO. N-16199

STATE OF TENNESSEE, ex rel
ROBERT J. HICKS, et al.

vs.

CITY OF CHATTANOOGA, et al.

NO. N-16209

STATE OF TENNESSEE, ex rel
NELL JOHNS, et al.,

vs.

CITY OF CHATTANOOGA, et al.

NO. N-16202

STATE OF TENNESSEE, ex rel
JAMES W. HARTLEY, et al.,

vs.

CITY OF CHATTANOOGA, et al.

MOTION FOR SUMMARY JUDGMENT

(Filed March 5, 1973)

Come the petitioners by and through their attorneys in the above styled cases, pursuant to Rule 56 of the Ten-

nessee Rules of Civil Procedure and move the Court to grant an order of Summary Judgment and for cause say:

I

That the defendants have not complied with Section 6-309 of the Tennessee Code Annotated which requires that:

> 6-309. Annexation by ordinance. . . . "that before any territory more than one-fourth (1/4) square mile in area or having a population of more than five hundred (500) persons may be annexed under this section, the governing body of the municipality shall adopt a plan of service setting forth at a minimum the identification and projected timing of municipal services proposed to be extended into the territory proposed to be annexed. Provided, further, that before any such plan of service shall be adopted, it must have been submitted to the local planning commission, if there be such, for study and a written report, to be rendered within ninety (90) days after such submission, unless by resolution of the governing body a longer period is allowed."

The petitioners would show unto the Court that the governing body of the City of Chattanooga never studied or adopted a plan of services for the annexed areas. That they simply voted to adopt the report by Hensley-Schmidt, Inc., entitled Updating of Fringe Area Study for City of Chattanooga, Tennessee, which was compiled in 1971.

The petitioners would further show unto the Court that this study is not a valid plan of services nor is it applicable to the petitioners under the present law because the proposed plan of services contained in the Hensley-Schmidt report was submitted to the City of Chattanooga using the 1971 Variable Tax Statute as a guide to determine the time table for the proposed plan of Services.

The petitioners would further show unto the Court that the consulting firm of Hensley-Schmidt, Inc., has in fact recommended to the defendant, City of Chattanooga, that in the event Chapter 420 of the Public Acts of 1971, which allows the use of a Variable Tax Rate, shall be unconstitutional or for any other reason becomes inapplicable.

"The City of Chattanooga, in this event, shall request its consultant to prepare the plan of services under the Act of 1961 as soon as practical." (Updating of Fringe Area Study for City of Chattanooga, Tennessee, p. 33, paragraph 7.)

That the Supreme Court of Tennessee held in December, 1972 in the case of *Chester L. Frost, et al.* v. *City of Chattanooga, et al.*, ——— S.W. 2d ———, that the 1971 Variable Tax Act was unconstitutional and is void.

This fact is further born out by the testimony of the defendants' expert witness, Marble Hensley, which is set out in Mr. Hensley's deposition as follows:

"Q Now, under the '71 Act, the Plan of Services that you recommended by followed, this was based entirely on the Variable Tax Rate, was it not?

A I'm sorry?

Q The Plan of Services that you recommended under this '71 up-dated study, this was based strictly on the Variable Tax Rate?

A Basically, our Plan of Services that should be rendered, we base that upon reviewing and providing a level of service and that would be commensurate with the remainder of the City. And we did indicate in this particular study that we ought to provide the various elements of this under our Variable Tax Structure, so that we suggested the starting of these services in a time frame that was geared to that Variable Tax Rate." (P. 39 lines 8-22).

"Q Now, on Page 33 of your report, the last sentence, you indicated that if the '71 Act was ever declared unconstitutional, that the City should request you to prepare a plan of services under the '55 Act, I guess you meant?

A Right.

Q As soon as practical, was this ever done?

A Well, we in trying to call attention to the City, I think, that there needed to be a – kept in mind that there were two things that we were dealing with in this instance. They have never asked us to provide any additional information." (p. 56, lines 17-25 and p. 57, lines 1-3).

"Q (Interposing) All these years then were computed on the pretense that the Variable Tax Act would be held constitutional, is that a true statement?

A Well, this summary, as you see it there, was based upon consideration of the Variable Tax Rate.

Q And that's true in all of the services you've listed on Page 29, and the years that –

A (Interposing) Based upon the year in which it would be provided, that's correct." (p. 63, lines 13-21).

The petitioners aver that since Mr. Marble Hensley testified under oath to the above averments there is no dispute of fact and the petitioners are therefore entitled to an order of summary judgment.

Respectfully Submitted:

BROWN & BROWN

By: /s/ W. L. BROWN

COFFEY & O'NEAL

By: .....
GLENN R. COPELAND

(CERTIFICATE OF SERVICE OMITTED)

APPENDIX C

IN THE
SUPREME COURT OF TENNESSEE
AT KNOXVILLE

NO. 91
HAMILTON COUNTY LAW

STATE OF TENNESSEE, EX REL,
JAMES W. HARTLEY, ET AL.,
Appellants

vs.

CITY OF CHATTANOOGA, ET AL.,
Appellee.

ASSIGNMENTS OF ERRORS, BRIEF AND ARGUMENT ON BEHALF OF APPELLANTS

RALPH E. VINEYARD
Suite 301 Maclellan Building
Chattanooga, Tennessee 37402
Attorney for Appellants

(TABLE OF CONTENTS AND AUTHORITIES OMITTED)

ASSIGNMENT OF ERRORS

A. STATEMENT OF THE CASE.

This appeal seeks to reverse a finding by the Honorable Sam Boaz, Special Judge, upholding a massive annexation undertaken by the City of Chattanooga. This matter is one of four annexations of various areas, consolidated for trial (TR-43) at the conclusion of which the Court upheld the annexation of this area and one other area, but denied the annexation of two other areas. The parties are referred to as below.

The City of Chattanooga Proposed Ordinances Numbers 6395 (TR-10) and 6396 (TR-17), along with Resolution No. 9167 (TR-20), purporting to adopt a plan of services, the plan of services being based on Chapter 420 of the Public Acts of 1971, popularly known as the Variable Tax Act. A public hearing was held as required, following which the ordinances were adopted.

The plaintiffs, residents of the North Mountain Creek Area, designated in the annexation proceedings as Area 13-A, filed a petition attacking the proposed annexation (TR-1) attacking the validity of the ordinances effecting the annexation; the failure to comply with the requirements as to plan of services; that the prosperity of the City of Chattanooga would not be materially retarded and the welfare of the inhabitants of the proposed annexed area would not be retarded; that this area was largely agricultural and would not support the services required or offered by the City of Chattanooga; and, that the plan of

services in support of the annexation did not comply with the law.

The City of Chattanooga filed its answer (TR-37) controverting the issues raised in the petition; alleging that annexation of the proposed area was for the benefit of the residents of this area as well as to benefit the citizens of Chattanooga.

Chapter 420 of the Public Acts of 1971, allowing the use of a variable tax rate, under which the City proposed the annexation involved herein was declared unconstitutional in December, 1972, and plaintiffs filed motions for summary judgments setting out the unconstitutionality of the act thereby claiming that the annexation was not in accordance with the law. (TR-31).

The defendants filed a motion to strike the motions for summary judgment (TR-74).

The matter then came on for trial on March 19, 1973, and the first matter taken up was the motion for summary judgment filed by all the plaintiffs. The motions for summary judgment were overruled (BE-4) and plaintiffs moved to be allowed to amend their complaints in substance to state that there had been no plan of services submitted, and this was allowed by the Court (BE-5). Plaintiffs excepted to the overruling of the motions for summary judgment (BE-7).

All plaintiffs relied upon and were bound by testimony of general witnesses attacking the annexation with residents of the areas as special witnesses.

The matter of other pending annexation cases was raised (BE-7), for the purpose of showing what a massive annexation has been undertaken and the matter was submitted for that purpose only (BE-18). The matter then proceeded and the first witness was Judge Chester L. Frost, County Judge for Hamilton County (BE-28). Judge Frost

testified as the fiscal agent for the County, relating particularly the financial circumstances of the County as they related to schools, etc.; the services of the County for road purposes and particularly the progress the County had made with respect to services rendered to its citizens. Judge Frost testified that he was familiar with the area designated as 13-A, that it was predominantly an agricultural and residential area with farms (BE-61); that he could see no advantage as far as public health, safety or welfare, that the citizens of this area would gain by being annexed; that this area had no particular law enforcement problem and that the only thing that would benefit these areas would be fire protection since the County does not operate a fire department and that if the only difference was the City would contract with a private firm instead of the individual, there would be no difference and that he knew of no prosperity that would come to this area by reason of this agricultural and geographical location coming into the City (BE-64).

The City, having referred to its previous annexation of a portion of Mountain Creek, Judge Frost testified that the former annexation had stopped because it was not feasible to continue due to the geographical or the topical nature of the area constituted of ridges and valleys (BE-104).

The next witness was Thomas Carlisle Elliott, Assistant Superintendent, Hamilton County Schools (BE-107). He testified as to the operation of the Hamilton County Board of Education, that the City received a greater share of federal funds than the County based upon the low income of residents inside the City; that twenty-three (23) bus vehicles would no longer be necessary because of the population decline in the Hamilton County Schools brought about by annexation; that the salaries of the City and County are generally very comparable; that

the two systems were comparable as far as personnel and qualifications; and, that if annexation is completed by April 1, of a particular year, then the City would take over the operation of schools affected the following August. He testified that children in the proposed 13-A annexation presently attended the Red Bank Schools (Red Bank being a municipality which will be surrounded if the proposed annexation is upheld as to Area 13-A). There are no schools in Area 13-A, and children in this area would be taken to some other school.

The next witness was Frank Newell, County Councilman, and former Sheriff of Hamilton County (BE-139). Mr. Newell served as Sheriff of Hamilton County for five and one-half years and prior to that was a member of the County Court. He testified that the Sheriff's Department had received its entire requested budget (BE-143). He testified that the growth of the City tended to be towards the Hixson area (an area not involved in these cases). Councilman Newell's testimony as relating to Area 13-A (BE-149), was that many of the houses in this area were there when he was a child; that the area is largely agricultural in most instances the homes being rather far apart and that he doubted or did not think that the City of Chattanooga could add anything to this community nor could this community add anything to the City of Chattanooga. That the area previously annexed had been primarily agricultural, but that this previous annexed area was conducive to apartment construction. That the County doesn't operate a fire system and has no garbage collection service but that the County does provide for traffic control. He testified further that the construction of apartments had created a congested area and that the previous annexation encompassed the level portion but excluded the mountainous and ridge area (BE-162).

The next witness was Luke Wilson, a member of the County Council, and who had previously served as a member of the County Court (BE-170). He testified that the growth of the City was north and east (BE-176). Mr. Wilson testified that he was familiar with the area known as 13-A and that this area is mostly agricultural; larger tracts of land and acreage instead of closely joined development; that the health, safety and welfare of the community could not be endangered if they were not annexed into the city and that the growth of the 13-A area would not be materially retarded if not annexed (BE-180).

The next witness was Herbert L. Parr, (BE-198) Director of the Chattanooga-Hamilton County Air Pollution Bureau. He testified that the Bureau enforces the law in the City of Chattanooga and Hamilton County and that there are uniform standards for the City and County (BE-200).

The next witness was Mr. Harvey Wade, (BE-202) Building Commissioner for Hamilton County. He testified that his job was to enforce zoning regulations and enforce building codes for Hamilton County. He testified that the only growth in Area 13-A was along Highway 27, and there was slow growth in the area west of Highway 27 in 13-A (BE-206).

There followed witnesses who testified only as to their particular area, and the next witness whose testimony would have a bearing on this matter was James B. Turner, former Sheriff of Hamilton County and Fire and Police Commissioner of the City of Chattanooga for a period of eight (8) years (BE-285). He testified that every plan of services he ever saw was always highly inaccurate as it applied to the Fire and Police Department; the City had almost lost its Class 3 rating because the annexed areas had not been brought up to date (BE-301). He testified

that Area 13-A was primarily agricultural and rural; that he did not think they needed Chattanooga and that Chattanooga did not need them (BE-304). He did not think the residents of Area 13-A would be endangered or that the health, safety and welfare of the residents would be endangered if not annexed to the City; that the City of Chattanooga would not be materially retarded if the annexation were not completed (BE-305). He testified that the area of Mountain Creek previously annexed was done at the request of a group of land developers because the developments could not be completed without planning on the City sewer service, and that services were rendered this area almost immediately when other areas of the City had not been provided services (BE-308).

There followed other witnesses, testifying as to specific areas, other plaintiffs. The next general witness was Jack Russell, Chief Deputy, Hamilton County Sheriff's Department (BE-402). He testified as to the law enforcement as to Hamilton County, including the budget and described the police services rendered to the County. He testified (BE-410) that he was familiar with the Mountain Creek area, it was primarily an agricultural community; the terrain is mostly hilly and with ridges; that the County Sheriff's Department had had no problems in this area. That the County conducts routine patrols.

The next witness was Walter Leon Hillis, a resident of Area 13-A, (BE-464). He testified he had lived there three (3) years, that he had twenty-six and one-half acres, and runs ten head of cattle and boards horses. He testified there are no schools in Area 13-A and that his children attend Red Bank Elementary School. He described the area as sparsely populated and primarily agricultural, with good roads, no complaint about police protection; and that the area was served by the Hixson Utility District, a water com-

pany. He testified that there were adequate recreational facilities available to his children as well as to other children. He testified that three ridges run up through the area, that it is hilly, rolling land with three steep ridges. In comparing the proposed area to the portion of Mountain Creek already annexed, he testified that the proposed area was more hills, bluffs and ridges, and that the area narrows as it goes north between the ridges. On cross-examination he testified he paid $9.25 for garbage service or $36.00 per year, but that there was no fire protection; that there were no sewers but that sewers had been installed for the portion of Mountain Creek previously annexed (heretofore covered in the testimony of James B. Turner, hereinabove referred to). He testified that his primary complaint against annexation was that he did not feel they could provide him with the services that they were going to tax him for and further, the problem that disturbed him was the school situation and that the children would have to be bused into Chattanooga.

The next witness was Mr. James Hartley, a resident of the 13-A Area. He testified he owned fifty acres, ran some livestock and had two horses. He described Area 13-A as primarily agricultural; that the portion of Mountain Creek already annexed but that the area considered in this proposed annexation varies considerably; that he had adequate garbage service. He testified he had a septic tank and if he were required to connect to the sewer, he would have to law (sic) one-eighth of a mile to the sewer line; that his septic tank had been adequate and he knew of no septic tank problems in the general area. He testified that police protection had been adequate, that the 13-A area was a low crime area and that he could subscribe to private fire service. He testified that the health, safety and welfare of the Area 13-A would not in any way be endangered if they

were not annexed; that the growth within 13-A or the City of Chattanooga would not be materially retarded if the annexation does not take place. He testified that there had been development along Highway 27, but not in the remote portions of the proposed annexed area.

The next witness was Mr. Eldon Hart, a resident of Area 13-A, (BE-483). He described Area 13-A as primarily agricultural or rural except for Highway 27, the extreme east portion of 13-A. He testified he had three children who attended school in the Red Bank area. He testified that the roads within the community were adequate; that police protection was adequate; and that there was very little crime in this area. He testified that any sewer system would have to have several pumping stations because of the topography of the land and that many residents would be so far from the sewer line that connection would be prohibitive.

The next witness was Mr. Leonard McCurdy, a resident of 13-A. He testified that he had roughly thirteen acres and that the general area was sparsely populated and consisted of several large tracts of land. That there were adequate roads to take care of the needs of the people in the area (BE-491). He testified that 13-A was mountain country, hill country, springs, covered with a few valleys of level ground but primarily mountain country. He testified that the health, safety and welfare of the people in the community would not be endangered if not annexed; that the growth of the area or of the City of Chattanooga would not be materially retarded if annexation were not allowed. He testified that the City had contracted with the Hixson Fire Department to serve the same area and that he could subscribe for private fire protection.

The next witness was Robert D. Massengale, a resident of Area 13-A (BE-506). He testified he had lived there

fifteen years, had one lot but that his father owned approximately 18 acres and that this was typical of the area; he testified he had a septic tank which had provided adequate service; that there had been no health problems in the area; that the police protection in the area had been adequate; that he had private garbage service which was adequate. He testified that the roads were adequate for the amount of traffic; that the general area was rolling or hilly and that the area proposed to be annexed is different from the portion of Mountain Creek previously annexed in that the previous annexation took most of the level ground for the purposes of apartments and condominiums. He testified that his safety or welfare would not be endangered in the absence of annexation.

The next witness was Goldie Phillips, a resident of Area 13-A, (BE-511). She testified that other than for the area right immediately around her where she resides on Highway 27, was a populous area but that generally the area is sparsely populated; that they subscribed to the Hixson Utility District and are furnished water; that they have adequate garbage service; adequate police service and that the area was not a high crime area. She testified that the health, safety and welfare of the people in the community would not be adversely affected if not annexed; that the growth of the area or of the City of Chattanooga would not be materially retarded if not annexed.

Counsel for the residents of Area 13-A asked if there were anymore residents, at which time Mr. Wayne Richie testified that he lived at 5219 McCahill Road and that his testimony would be exactly like other witnesses in the area (BE-515). Mr. Richie testified he had lived in the proposed area for about fifteen years, that he has a house and four and one-half acres; that the area is primarily agricultural; with ridges and unsuspectible to development of apart-

ments and residences because of the topographhy; that sewer lines would be difficult for these areas. He testified that he had a septic tank and field line that was satisfactory; that he had no complaints about the police service. He testified that the residents of this area would not be materially retarded if not annexed; that the health, safety and welfare of the community would not be endangered.

The next witness was Mr. Gordon Massey, who resided at 5745 Dayton Boulevard, within the area designated as 13-A. He testified that there had been very little growth except for the area along Highway 27; that the area was largely agricultural and hilly; that he was satisfied with all the facilities, water, streets, sewage and garbage. And, that his answer to other questions would be cumulative so far as the effect of annexation or the failure to annex in these areas.

The proposed annexation, having been based on figures supplied by the firm of Hensly-Schmidt, Mrs. Jane Carter next testified on behalf of all plaintiffs (BE-589). She had been requested to determine from the City's figures how much had been paid to this firm and she testified that for the year 1973 the City had paid the sum of $500,258.21; for 1972 $504,534.03; 1971 $458,267.23; for 1970 the sum of $559,743.33; for a total payment from April 1963 through March 9, 1973, of $3,622,162.86 (BE-592).

There followed other witnesses from other areas, some testimony relating to the entire annexation. The next major witness was Sam P. McConnell, Superintendent of the Hamilton County Schools for the past seventeen years (BE-628). He testified generally about the development of the school system, that the education has been upgraded over the past five years; with an increased budget over the past five years, with the increase of $1,000,000.00 the year before (BE-644). He testified that the children in the

area of 13-A attend the Red Bank Schools; that the children are bused to school free of charge, there being no schools in this proposed annexed area and none proposed by the City, that these children would be bused to a city school elsewhere than in their home community.

Other witness testified as to areas not involved in this area 13-A, and the next witness was David Grey Richardson, employed by Rust Engineering Company, as an urban planner in the urban and industrial planning department of Rust Engineering Company (BE-684). He testified he had been employed by all plaintiffs to study the proposed annexation and gave testimony showing his qualifications. That pursuant to his employment, he had examined the conditions of the City of Chattanooga as well as the condition of the areas proposed in this proceeding for annexation.

He testified that as to Area 13-A, that there is a fairly definable rural type community that exists; that there is not really a centralized community; that primarily Area 13-A was rural farm land and if not actually in farms, composed of acreage or a house with acreage (BE-750). The area is sparsely populated because of topographic reasons; that there is relatively a small development of land for urban use. That this particular area would not be retarded by not being annexed or that Chattanooga would not be retarded for the failure to annex; that the health, safety and welfare of 13-A would not be materially retarded in any way by not coming into the City of Chattanooga.

This witness also testified as to the difference in the area of Mountain Creek heretofore annexed as being more suitable for development that the proposed area of Mountain Creek, 13-A; 13-A with a much lesser proportion of land that is suitable for townhouses or planned unit development; that the majority of the land is fairly steep and

not suitable for development for apartments; and that accessibility to this proposed area is limited (BE-869).

The next witness was James Lee Zimmerman, Jr. (BE-878), an employee of Rust Engineering Company. He testified that at the request of the plaintiffs in connection with this litigation he examined the general picture of Chattanooga from a financial standpoint and the areas that are affected.

This witness testified (BE-930) that the total deficit over a seven year period for Area 13-A, that is expenses in excess of revenues, had totaled $1,606,292.00, and with a total deficit for the four proposed areas amounting to $5,435,-759.00. and that such figures would constitute an undue burden on the citizens of Chattanooga to incur this additional expense. With the change in the tax structure the present revenue would be reduced by $79,495.00, therefore increasing the burden. That there is a deficit in Area 13-A of $404.721.00 to provide the sanitary sewage facilities. That the median value of the homes in Area 13-A of $17,500.00 would pay $396.29, and upon coming into the City would pay $611.29, an increase of $215.00. The recommendations in the annexed fringe area study showed there were no immediate facilities proposed for improvement in 13-A; that there is practically no major accessible streets in 13-A and no recommendations were made other than for resurfacing the existing streets; that 13-A was classified as low density, large amounts of vacant land, there are topography problems which would prohibit the development of this area.

He further testified that the failure to take into account the cost of busing school children would materially increase taxation of these four areas (BE-957).

The building of streets, the City having been doing 23 miles per year with new construction at 7.2 miles per year,

would indicate a period much longer than the eight years for construction of the streets as proposed by the City.

Mr. Zimmerman was the last witness to testify for the plaintiffs.

The first witness for the defense was Dr. James W. Henry, Superintendent of the Chattanooga Public School System (BE-1030). Mr. Henry testified in essence that the City has a greater per pupil expenditure than does the County and he relates the expenditure of money to the quality of education; that if 13-A is annexed the Mountain Creek School would absorb the elementary grades and the high school students be transferred to City High School or the Junior High School. Mr. Henry further testified that annexation creates problems for the city schools and that if the areas proposed were not annexed, that would not retard the City School System and that the County schools are in limbo because they are not certain whether the County will keep the schools or whether the City will take them over and that if the areas were not annexed, it would not retard the City School System (BE-1090).

Dr. Lee Green, Professor of Political Science at the University of Tennessee in Knoxville, whose direct testimony indicated that he favored annexation as a political proposition and as an appropriate means of solving metropolitan problems in the major cities of Tennessee. He testified that he made one trip through the Mountain Creek Area, 13-A (BE-1096). He testified that he had made no investigation as to costs, whether or not the annexed areas could support themselves or whether the annexation would constitute an additional burden on the City of Chattanooga.

With respect to Area 13-A, Dr. Green testified that he had made one trip through this area, agreed that it was of hilly terrain, sparsely populated, except for an area along

Highway 27, the extreme eastern edge of the proposed annexed area; that he had not made any detailed study as to whether or not the City could furnish the services proposed under the annexation ordinances, particularly within a period of seven or eight years. So, as a matter of detail, Dr. Green could not testify as to costs of services, etc. (BE-1128-1136).

Dr. Frank W. Failing, Director of the Division of Environmental Health of the City-County Health Department, testified as to the health conditions relative to sewers (BE-1174). Dr. Failing's chief testimony related to sewer problems in the area of Highway 27 on the extreme east end of the proposed area but that in the major portion of this area, there had been no complaints as to sewage and no testimony as to whether this area would support a sewer system. Dr. Failing testified that there had been a problem with north Chickmauga Creek at the extreme northern end of the proposed annexation (BE-1194).

The next witness was T. D. Harden, an employee of the Chattanooga Hamilton County Regional Planning Commission, who testified in favor of annexation (BE-1196). He favored annexation of all four areas on the basis that the prosperity of these areas might be improved by annexation. He defined Area 13-A as had previously been defined with development along Highway 27, but no development in the remote areas of 13-A. Harden testified that he had reviewed the "Plan of Services" submitted to the City of Chattanooga; his report being contained in Exhibit 12 (BE-1200). He defined Area 13-A as low density residential with high density residential in the vicinity of U.S. 27 and 153.

The witness, Harden, testifying from his report which stated that "If Chapter 420 of the Public Acts of 1971

which allows the use of the variable tax rate shall ever be finally held unconstitutional or for any other reason it becomes inapplicable, then the annexation shall be governed and effectuated under the statutes in effect at the time Ordinance No. 5977 was passed, namely the Public Acts of 1961. The City of Chattanooga, in this event, shall request its consultant to prepare a plan of services under the Acts of 1961 as soon as practical" (BE-1256).

The witness, Harden's testimony as to Area 13-A agreed with the description of the area; that in the portion of Mountain Creek previously annexed that the City of Chattanooga did perform services within a relatively short period of time, primarily because of the development of the apartment complexes, condominiums, etc., and which area developers had requested the City to annex. He testified that the prime development in Area 13-A was along Highway 27, but that there had been little growth in the other areas of 13-A (BE-1270-1277).

The next witness was Mr. Bob Maddox, Executive Director of the Committee of One Hundred, and was qualified as a certified industrial developer (BE-1335). His testimony concerned industrial development and the necessity for having adequate areas available for industry requirements. Mr. Maddox testified that Area 13-A was not zoned or that there was no industrial zoning in this area. That this area is primarily ridges and agricultural land (BE-1372).

The next witness was John R. McGauley (BE-1377). He testified he was Executive Officer of Fidelity Trust Company and the Account Company and was generally in the real estate business. He testified the land values were higher in all of the proposed areas primarily because of their proximity and that there was a limited amount of land available in Chattanooga for residential development. His description of Area 13-A fit that given by other wit-

nesses, it being hilly but with land that could be developed. And that this extended area of Mountain Creek did not fit the general description of the portion heretofore annexed. The area 13-A would be largely residential since it was not zoned commercial or industrial.

The next witness was John M. Love, an employee of Stanley Lachman Company, Inc., as a general insurance agent (BE-1395). He testified 13-A was in a Class 10 insurance rating which indicated no protection. He testified that unless the City complied with requirements so as to reduce the insurance classification from 10 to a lower figure, annexation would not reduce the insurance classification (BE-1314).

The next witness was Ralph G. Lewis, Jr., City Traffic Engineer for the City of Chattanooga (BE-1422). He testified as to 13-A, that he had ridden through the area; described Mountain Creek Road as very narrow with open ditches on the sides and with curves; he testified the first thing the City would do would be to put up street signs. This witness had little to offer with respect to 13-A since there was very little traffic and there had been no reason for any traffic surveys so that the only thing that would be done in this area would be to put up street signs. This witness had made no detailed study of Area 13-A.

The next witness for the defense was William H. Zachary, City Auditor of the City of Chattanooga (BE-1458). He testified that the current bond rating of the City of Chattanooga was A1, which means that the City bond is acceptable for investment purposes by national banks and generally considered an excellent bond. He testified that the assessed valuation of Area 13-A was $3,634,000.00. He testified that the tax rate for property was $3.50 per $100.00 assessed valuation. He testified that the City was able to afford the annexation of these four areas and that the in-

validity of the variable tax act would have some effect because services would not have to be provided as quickly (BE-1477). He testified that there would be a deficit of approximately $1,000,000.00 for Area 13-A. He testified the population of Area 13-A was 2,446 persons. And, if federal revenue sharing were not continued, that the proposed revenue would be reduced by $50,000.00 which would add to the deficit resulting from annexation of 13-A (BE-1516).

The next witness was Jerry Pitts, Chief of Police of the City of Chattanooga (BE-1542). He testified as to police coverage, that he proposed to put another patrol district in 13-A. He testified as to relative pay scale for city policemen. He testified that they were experiencing residential burglaries in Area 13-A. No further specific evidence was given by this witness as relates to Area 13-A.

The next witness on behalf of the City was Mr. Gene Roberts, Commissioner of Fire and Police (BE-1582). He testified as to the operation of the Police and Fire Departments. He testified that the City had a fire station at Signal Mountain Boulevard and Mountain Creek Road which would be in a direct line north to Area 13-A. He further testified that an additional station would be in operation within three years but there was uncertainty as to fire hydrants because of the size of mains and the question of getting water available. Relating to 13-A, Commissioner Roberts testified that fire hydrants could not be installed until the mains were laid, that the streets could not be improved until sewer and water lines were laid, so that there was conjecture as to when services of this nature could be provided to this area. The main thing that the Commissioner could offer would be an added patrol car but that other services would be prolonged.

The next witness on behalf of the defendants was Mayor

Robert Kirk Walker, Mayor of the City of Chattanooga (BE-1743). Mayor Walker testified that on August 31, 1971, the firm of Hensley-Schmidt was directed to update an engineering study relating to the fringe areas pertaining to additional annexation. In November the City received the updated report which was transmitted to the Chattanooga-Hamilton County Regional Planning Commission for staff review. The City Commission passed a resolution providing for appropriate advertising for a public hearing on January 11, 1972, and the hearing was held January 24, 1972. That on January 25th, the City Commission adopted a plan of services for these four areas, 13-A along with other areas. It was an alternative adoption of a plan of services providing for specific timetables under the 1971 Variable Tax Statute and if unconstitutional, then under the 1955 and amended 1961 statutes. That subsequent to the adoption of the resolutions that the City Commission unanimously adopted ordinances as pertained to the general annexation.

He testified that Hensley-Schmidt had done the initial study in 1967 and that the updating was of this previous study. Mayor Walker's testimony was generally in wholehearted support of the annexation. On cross-examination Mayor Walker testified that all areas being annexed were predominantly white, that only one area was referred to as a colored area (BE-1821). He testified that the Mountain Creek Area, 13-A, was a low density area, medium to high-grade residential but that he thought density would grow with annexation. This concluded the evidence and plaintiffs were allowed one week to submit written arguments with the City having opportunity to respond within three additional days.

Plaintiffs filed a written argument (TR-153).

The Court filed a memorandum opinion (TR-163) and amended at (TR-173) upholding the annexation of Area 13-A and Area 9-B, but denying annexation of Area 4 and Area 12.

An order was entered incorporating the Court's findings (TR-177). All parties filed motions for new trial (TR-192). All motions were overruled and the final order was entered (TR-196) with plaintiffs granted an appeal to this Court.

Respectfully submitted,

/s/RALPH E. VINEYARD
Attorney for Plaintiffs

B. SPECIFICATION OF ERROR.

I.

THE COURT ERRED IN OVERRULING THE MOTION FOR SUMMARY JUDGMENT MADE PRIOR TO THE TRIAL OF THIS CASE.

II.

THE COURT ERRED IN UPHOLDING THE ANNEXATION OF THE NORTH MOUNTAIN CREEK AREA KNOWN AS AREA 13-A TO THE CITY OF CHATTANOOGA, BECAUSE THERE WAS NO PLAN OF SERVICES.

III.

THE JUDGMENT OF THE COURT IN SUSTAINING THE ANNEXATION OF THE NORTH MOUNTAIN CREEK AREA WAS CONTRARY TO THE WEIGHT OF EVIDENCE.

BRIEF

In order for a municipality to annex ". . . the governing body of a municipality shall adopt a plan of services setting forth at a minimum the identification and projected timing of municipal services proposed to be extended into the territory proposed to be annexed," Tennessee Code Annotated 6-309; *State of Tennessee, ex rel. Frank Spoone, et al.* v. *Mayor and Aldermen of the Town of Morristown,* 222 Tenn. 21-28, 431 S.W.2d. 827 (1967).

The City of Chattanooga formulated a plan of services using the variable tax rate which was authorized in Chapter 420 of the Public Acts of 1971. Prior to this annexation, the Act was declared unconstitutional in *Chester L. Frost, et al.* v. *City of Chattanooga, Tennessee, et al.,* —— S.W.2d. ——, (1972). Considering this annexation with these developments, there was no plan of service adopted by the municipality prior to annexation, and the annexation should not have been sustained.

In deciding whether to sustain the annexation of an area the question by statute is "whether the proposed annexation be or be not unreasonable in consideration of the health, safety, and welfare of the citizens and property owners of the territory sought to be annexed and the citizens and property owners of the municipality." Tennessee Code Annotated 6-310; *Morton* v. *Johnson City,* 206 Tenn. 411, 333 S.W.2d. 924 (1960).

ARGUMENT

Assignment of Error No. 1.

The Court erred in overruling the motion for summary judgment made by the plaintiffs prior to the trial of this case. Motion was made on the grounds that the

governing body of the City failed to comply with T.C.A. 6-309 in not adopting a Plan of Services but simply using the report made by Hensley-Schmidt, Inc., entitled "Updating of Fringe Area Study for City of Chattanooga, Tennessee," using the 1971 Variable Tax Statute as a guide to determine the timetable for the proposed plan of services. In this report it was recommended that should the Variable Tax Act be declared unconstitutional, the City would request its consultant to prepare the plan of services under the Act of 1961 as soon as practicable, (Updating of Fringe Area Study for City of Chattanooga, Tennessee, page 33, paragraph 7). It is the appellants' argument that the motion for summary judgment should have been granted since the Variable Tax Statute was the guide used by Hensley-Schmidt, Inc., to formulate the plan of services. That Act was declared unconstitutional in December of 1972 in the case of *Chester L. Frost, et al.* v. *City of Chattanooga, Tennessee, et al.* —— S.W.2d. ——. The new plan under the act of 1961 was not prepared prior to passage of the ordinance by the City of Chattanooga annexing the North Mountain Creek Area to the City of Chattanooga, as was recommended by Hensley-Schmidt. Consequently, this annexation was illegal under T.C.A. 6-309, because the plan of services was not prepared prior to the annexation. Therefore, the Court erred in not granting the plaintiffs an order for summary judgment since the right to annex did not arise.

Assignment of Error No. 2.

The Court erred in upholding the annexation of the North Mountain Creek Area known as Area 13-A to the City of Chattanooga. According to T.C.A. 6-309, a plan of services shall be adopted prior to any proposed annexation. It is contended by the residents of 13-A that a re-

port by Hensley-Schmidt, Inc., was adopted by the City of Chattanooga, not a plan of services. However, this plan was based on the Variable Tax Act which was declared unconstitutional in *Chester L. Frost, et al.* v. *City of Chattanoga, et al., supra.* Since the City of Chattanooga based their proposed plan of services on this variable tax act, they realized the basic unfairness to the citizens of Area 13-A or North Mountain Creek in requiring them to pay the same tax as citizens of Chattanooga who receive all the services the City can provide. This unfairness stems from the fact that it will be several years at the least until the North Mountain Creek Area will be provided the full city services, including full fire and police protection, sewer services, schools, etc. It was to alleviate this basic unfairness that the City adopted the plan proposed by Hensley-Schmidt based on the Variable Tax Act which would have allowed the residents of 13-A, North Mountain Creek, to pay taxes only for those services they were receiving and as more city services were added to the area, taxes would increase until the full rate was paid. However, without the benefit of the variable tax act the City's plan of services may have been unreasonable on its face and not a plan which would meet the requirements of T.C.A. 6-309. Since the plan of services offered by the city for Area 13-A was materially affected by the Variable Tax Act, it was error for this annexation to be allowed to proceed without in effect a reasonable plan of services not based on the variable tax act. Before the city has a right to annex, a plan of services must be adopted as clearly stated in *State of Tennessee, ex rel., Frank Spoone, et al.* v. *Mayor and Aldermen of the Town of Morristown,* 222 Tenn. 21-28, 43 S.W.2d 827 (1967).

> "This area proposed to be annexed exceeded one-fourth of a square mile and in accordance with T.C.A.

> 6-309, the Town of Morristown adopted a plan of services which set forth by identification in time the municipal services which would be extended to the area and offered proof of the financial ability to provide same. We say this not to decide the case but to exclude a problem since the adoption of such services is required by the statute prior to any right to annex by ordinance and such is not at issue on the reasonableness of the ordinance."

As this case states, the adoption of a plan of services is required prior to any right to annex by ordinance. Appellants argue that a plan of services in accord with the statute was not formulated after the unconstitutionality of the Variable Tax Act was determined, as suggested by Hensley-Schmidt, but the City proceeded without revising the Hensley-Schmidt plan. Therefore, annexing by ordinance illegally.

Assignment of Error No. 3.

The judgment of the Court in sustaining the annexation of North Mountain Creek was contrary to the weight of the evidence. The extensive proof presented in the trial of this case showed the unreasonableness of this annexation. According to statute, one of the criteria in determining whether to uphold the annexation of a particular area is "whether the proposed annexation be or be not unreasonable in consideration of the health, safety and welfare of the citizens and property owners of the municipality." Tennessee Code Annotated 6-310.

The standard the Courts apply as to reasonableness is outlined in *Morton* v. *Johnson City*, 206 Tenn. 411, 333 S.W.2d. 924, wherein the Tennessee Supreme Court held:

> "* * * the court does not, in any sense, substitute its discretion or judgment as to the advisability or

> propriety of the annexation for that of the legislative body of the city, and that it does not review the legislative discretion; its consideration of 'reasonableness' is confined to a determination of whether there exists a sufficient showing of reasonableness to make that question, at the least, *a fairly debatable one; if there is such, then the discretion of the legislative body is conclusive.* (Emphasis the Court's).
>
> The function of our courts, historically, has been merely to determine, in the light of these principles, whether the exercise of the legislative powers *has been arbitrary and clearly unreasonable.* (See the cases just cited.) *Only to this extent do our courts consider the reasonableness of an annexation."* (Emphasis the Court's).

The plaintiffs recognize that this is the standard followed by the Courts in annexation cases. The plaintiffs believe, however, the facts of this case prove that the City has exercised its legislative powers arbitrarily and unreasonably.

The prosperity of the City of Chattanooga and that of the North Mountain Creek Area would not be materially retarded by the failure of this annexation; neither would the health, safety and welfare of Area 13-A be adversely affected if they were not annexed into the City of Chattanooga.

The prerequisites set out to allow annexation according to statute are the health, safety and welfare of the area to be annexed. It is important to consider these prerequisities individually.

Considering the health aspects of Area 13-A, the same health department serves both the City as well as the County. The residents of 13-A testified they have no sewage problem and are satisfied with their use of septic tanks. As to the water provided for Area 13-A, a utility district

serves this area with a healthy and adequate source of water. Since Area 13-A is agricultural with no industrial development and a low density population, it has no pollution to endanger its residents as does the City of Chattanooga; also, because of this agricultural nature, there is no problem of density of structures and population.

The question of safety of the residents of this area is also important. As the testimony of the residents of this area showed, Area 13-A is a low crime area where police service is seldom needed; however, the police service when needed, has been supplied by the County to the satisfaction of area residents. Conversely, the City of Chattanooga has a severe crime problem. How can it be reasonable to annex an area with little crime to a city with major crime. Such annexation would materially retard and endanger the safety of Area 13-A.

Fire protection has been available to the residents of this area through subscription. Those who did not subscribe for fire protection have paid a higher rate of insurance but still less than it would cost them to be in the City. The City currently has a deficiency of fire hydrants which has almost caused a fire insurance reclassification. This problem should be relieved before any additional area is annexed to the City.

A third prerequisite to allow annexation concerns the welfare of the area to be annexed. Education would fall into this category. The City does not plan to build new schools in this area but proposes to leave these students in County schools for two years or more. Housing is also a part of the welfare of the area. This are will not produce a great residential building because of the unsuitability of the land. The building which has occurred in the part of Mountain Creek previously annexed will not occur in Area 13-A because of the difference in the terrain.

The North Mountain Creek Area is composed primarily of hilly terrain, such that concentrated residential or industrial development is impossible or would be too costly. Ridges run on each side, with only a narrow and curvy road between the ridges. A major consideration in any development, whether residential or industrial, is the availability of land for development. Not only is the land in Area 13-A unsuitable, it is also unavailable for development. Most of the land in this area is in large tracts of acreage belonging to a few individuals who have no desire to sell their property for development. Considering the unsuitability of the land, as well as its unavailablity, the annexation of this area cannot possibly retard the growth of the City of Chattanooga. No additional growth or development will be possible even if the annexation is allowed. The amount of revenue received from the present residents of Area 13-A would not justify the amount of money the City would spend providing services for the area.

The residents of this area testified that adequate fire protection was available to them through a private fire department; their children attend the Red Bank Schools which are adjacent to this area and are on a generally equal level with the City schools the children would attend if North Mountain Creek was annexed; police protection from the County is a regular service and is available if needed, although Area 13-A is a low crime area and police service is very seldom needed; garbage service is satisfactory through private services; sewage facilities were and have been for many years adequate; the roads are adequate for the minimal amount of traffic using these roads. Satisfactory and sufficient services for the residents of Area 13-A are available to them so that any argument that this area would be materially retarded if not annexed is un-

founded. The residents of this area are satisfied with the available services and do not desire any different services, nor do they feel their area is retarded by not being a part of Chattanooga. These residents are of the opinion their health, safety and welfare would be impaired if they were brought into the City and certainly the growth of the area would be retarded if they were annexed.

North Mountain Creek, Area 13-A, is primarily agricultural. The population is limited and low density, with most of the residents having lived in the area for several years; these residents use their land for agricultural purposes, such as farming and pasture. As testimony during the trial indicated, there is no centralized community in the North Mountain Creek Area where any development beyond a house with acreage has occurred. These individuals consider themselves residents of a rural area and have no desire to become part of a community or part of the City of Chattanooga.

Admittedly, there has been very limited commercial development along U.S. Highway 27 in Area 13-A, between the city limits of Red Bank and Boy Scout Road, but this is the only development in the entire area and it has occurred due to frequently traveled Highway 27.

The North Mountain Creek Area is unable to support the services offered or required by the City of Chattanooga. This inability to support is due to the nature of the land. As Mr. James Zimmerman testified, approximately 68% of the soil in the North Mountain Creek area has some degree of limitation on residential development either from a central sewer point of view or from providing transportation facilities. A little over 2/3 of the soil in this area has some limitations on development. (P. 951-953, Vol. 7). The land in Area 13-A will not support the kind of development the City of Chattanooga expects to arise from

this annexation. Currently, there are practically no major accessible streets in Area 13-A and, as Mr. Zimmerman testified, the development of such streets will be negatively influenced by the type of soil in the area. If the installation of sewers as well as the construction of roads is going to face limitations as Mr. Zimmerman testified, then the annexation of this area will in effect place these residents in the position of having to pay taxes to the City of Chattanooga for sewers and roads which will not be on a level equal to other areas in the City but will actually be the same as they are currently, because the soil will not support different construction.

CONCLUSION

It is therefore respectfully submitted that the Court erred in sustaining the annexation of North Mountain Creek, Area 13-A. The City has not met the requirements of the statutes in order to annex. A plan of services pursuant to Tennessee Code Annotated, Section 6-309, was not adopted; and the annexation was unreasonable in consideration of the health, safety, and welfare of the residents of Area 13-A.

This area and the City of Chattanooga will not be materially retarded if the area is not annexed; rather, the opposite is true. Area 13-A will be adversely affected and materially retarded if this annexation is allowed.

Respectfully submitted,

/s/ RALPH E. VINEYARD
Attorney for Plaintiffs

301 Maclellan Building
Chattanooga, Tennessee 37402

[CERTIFICATE OF COUNSEL OMITTED]